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No. 535

In the

Supreme Court of the United States

OCTOBER TERM, 1956

SAM C. MOZER, *et al.*, d/b/a MOZER BROS,
Petitioners,

v.

HI-YIELD CHEMICAL COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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Petitioners,

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HI-YIELD CHEMICAL COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

REPORTS OF THE OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals in this cause is reported in 234 F. 2d 906, and is printed in the Appendix, pages iii-v. No written opinion was filed in the District

Court, whose judgment appears in the Appendix on pages i-ii, and whose findings of fact and conclusions of law are set out in full in the opinion of the Court of Appeals.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment of the United States Court of Appeals for the Fifth Circuit in this cause was rendered and entered on June 28, 1956.

2. The order denying petitioners' motion for rehearing by the Court of Appeals was rendered and entered on July 31, 1956.

3. Jurisdiction to issue writ of certiorari is invoked under 28 U. S. C., Section 1254, and should be issued by force of Supreme Court Rule 19(b).

THE QUESTIONS PRESENTED FOR REVIEW

The District Court, by its 6th Finding of Fact, found "* * * that there was no *express* agreement * * *" for a rescission, but the Court of Appeals construed the 6th Finding of Fact as an "implicit finding of the district court that the appellees (respondents) had the right to return the improperly packaged insecticide." It is an important purpose of the rule of procedure requiring findings of fact to be made in all actions tried without a jury that litigants in appeals courts may be fully and exactly informed with respect to what the trial court decided, to avoid uncertainty, conjecture and waste. That purpose has now been defeated by the Court of

Appeals in its disposition of this case. It is important to the administration of justice to preserve the integrity of the rule which demands of the trial court that its findings be known. The desirable principle inherent in the mandate of Rule 52 should not be lost to us by a process of erosion, the camel should not be permitted to get its head under the tent.

STATEMENT OF THE CASE

Jurisdiction was invoked in the district court by virtue of diversity of citizenship, and was fully established.

Suit was filed on an open account, and the respondents counterclaimed in an offsetting amount for certain goods earlier sold and fully paid for which they claimed were unmerchantable because improperly packaged. The petitioners appealed from an unsatisfactory judgment rendered in a non-jury trial.

The petitioners, successors in interest to Chemical Corporation of Colorado, were substituted as plaintiffs in an action for debt brought against Hi-Yield Chemical Company and Hi-Yield Fertilizer Company, the respondents—treated throughout the trial as an entity and who will be collectively and singly referred to in this petition without distinction—to recover the adjusted invoice price of certain agricultural insecticides, $35,913.50, sold on open account *in the summer of 1951*, and an additional sum of $1,113.06 for freight and demurrage charges, less a credit of $13,561.50 realized from the sale of two returned carloads of a cotton poison known as 1-2 Mix. This 1-2 Mix had

been sold by Chemical Corporation of Colorado to the respondents *in January and February of 1951, and paid for in March of that year*, at $4.50 a gallon, a total of $35,-932.75. (R. 7, 20-22; R. 23-30; R. 51-54.)

In their answer and counterclaim the respondents asserted that the 1-2 Cotton Mix, which is a compound of one part of aldrin, a trade-marked chemical, and two parts DDT, was "* * * defective, improperly packaged, and unsuitable for resale in the trade;" and that petitioners' predecessor in interest, Chemical Corporation of Colorado, *had agreed to accept return of the 1-2 Mix and to give respondents credit therefor in the full amount of the purchase price.* (R. 23, 24, 28.) This 1-2 Mix was shipped to the respondents in metal drums, the majority of which at least were of a type known as "open end," which the respondents contended were not acceptable to farmers. The *last of August, 1951* the drums of 1-2 Mix shipped in January and February of that year by Chemical Corporation of Colorado and paid for in March (R. 412), containing 7,810 gallons, were loaded in two freight cars at Bonham, Texas, consigned to Chemical Corporation of Colorado, and were received in Denver on September 4th. (R. 70.)

Chemical Corporation of Colorado protested the return of these two cars of 1-2 Cotton Mix, but unloaded them and stored the 1-2 Mix following receipt of a telegram from the respondents on September 14, 1951, reading, "This telegram will be your authority to unload cars for our account as per letter previous date. Letter to this effect follows." (R. 70; also Exhibit 20 attached to petitioners' request for

admissions, R. 414-415.) About two years later the returned 1-2 Mix was disposed of by Chemical Corporation of Colorado for $1.75 a gallon, or a total of approximately $13,700.00 ($13,561.50); for which, as heretofore noted, credit was given by the petitioners, who in consequence sought by their suit to recover of the respondents $23,-465.06, the difference between the invoice price of the insecticides sold in the summer of 1951 and the amount salvaged from the sale of the earlier, returned shipment. (R. 22-30.) The respondents by supplemental pleading set up that Chemical Corporation of Colorado in selling the returned merchandise failed to use ordinary care to minimize damages. (R. 31.)

The District Judge found that the 1-2 Mix was improperly packaged and shipped in containers insufficient for its intended use; that Chemical Corporation of Colorado "* * * was negligent * * * and did not act with due diligence in an effort to minimize its damages, and that it should have, upon receipt of such cotton insecticide, sold the same immediately;" had it done so that $3.75 per gallon would have been realized from the sale; and that there was no agreement on the part of Chemical Corporation of Colorado to accept return of the 1-2 Mix. There was only one conclusion of law, as follows:

> "I find that plaintiffs are entitled to recover of and from the defendants the difference between the purchase price of the cotton insecticide, to-wit, $4.50 per gallon, and the existing market price of such cotton insecticide immediately after it was received in Denver, Colorado, by the plaintiffs' assignor, to-wit $3.75

> per gallon, or a judgment for a total sum of $5,707.50, less a credit to said defendants, of $1,244.00, the amount of the deposits which defendants had made upon the insufficient and defective drums, in which the cotton insecticide was shipped to the defendants and sent back to the plaintiffs' assignor." (R. 472-473.)

Judgment was accordingly rendered in favor of the petitioners for $4,663.50, with interest from the date of the findings, April 8, 1955, at the rate of 6% per annum. (R. 483.)

REASONS FOR GRANTING WRIT OF CERTIORARI

After declaring that the packaging of the 1-2 Mix in open-end drums was a breach of an implied warranty, the Court of Appeals disposes of what it regards as the pivotal question in the case by saying merely that, "The testimony was in sharp conflict as to whether the appellees waived this breach of implied warranty, but there was ample evidence to sustain the *implicit* finding of the district court that the appellees had the right to return the improperly packaged insecticide." (Italics supplied.)

"There is no general rule of law better established in this State (Texas) than that, in the absence of fraud or an express agreement to take back an article of property sold under a warranty, the vendee cannot return the article and recover back all of the purchase money or that part of it which he has paid.

"The only condition under which a buyer has the right of rescission by reason of the warranty of the seller, in the

absence of fraud or an agreement for rescission, is where the article or property purchased proves wholly unsuitable for the use or purpose for which it is known to seller that the buyer intends to place it, or the identity of the article (sic) and it proves to be something other than that which was purchased." [*Dillard, et al. v. Clutter (Tex. Civ. App.), 145 S. W. 2d 632, 634, writ of error refused.* See also *Sales, 37 Tex. Jur., Sec. 240, pages 527-530.*]

There was no contention or evidence of fraud, the trial court found there was no agreement for rescission, and neither the undisputed facts nor the findings will support a contention that the merchandise was wholly unsuitable.

If it should be suggested that the Court of Appeals read into the trial court's judgment and findings the converse of what is there stated; in other words, that petitioners' predecessors in title *impliedly* agreed to accept return of the 1-2 Mix, the record affords no basis for such an assumption, for unless there was an express agreement there was no agreement. Not a jot or tittle of testimony supports the holding that Chemical Corporation of Colorado impliedly agreed to accept return of the 1-2 Mix. The respondents themselves made no such contention, but defended upon a claim of an express agreement, and only an express agreement, by Chemical Corporation of Colorado to accept return of the cotton poison. The following quoted portions of the respondents' answer and counterclaim are inclusive, and speak for themselves:

> "Defendants admit that on or about the 28th day of August, 1951 they returned two carloads of mer-

chandise, which had been previously received from Chemical Corporation of Colorado during the year 1951, but deny that it had been theretofore fully paid for; and, in this connection, defendants state that same was returned to Chemical Corporation of Colorado *with the specific knowledge of and at the instance of Chemical Corporation of Colorado because the same has theretofore been admitted by it to be defective merchandise*, and said corporation had agreed to receive the same in return, and upon receipt thereof the same was to be credited as an offset to anything due and owing by the defendants to said corporation at the price for which it had been originally billed out to the defendants. Defendants can neither admit nor deny what Chemical Corporation did with said two carloads of merchandise when the same were received at Denver. Defendants deny that when received in Denver same was any part of the defendants' property, but it was the property of Chemical Corporation of Colorado, to do with as it saw fit, *having theretofore*, prior to the return of the same to it, *agreed to give credit to the defendants upon receipt of the same in a sum equal to what it had been charged out to defendants when shipped originally to them*, which amount of credit should have been in favor of the defendants in the amount of $35,932.75; *and defendants* here and now *say that if Chemical Corporation of Colorado had carried out its agreement in this respect*, when all accounts and charges between it and defendants were settled, these defendants should have received a refund of $17.25. Thereby (sic) defendants are not now and have never been justly indebted to Chemical Corporation of Colorado nor the plaintiffs herein in any amount." (R. 24-25.)

"That in the early part of 1951 this condition was repeatedly called to the attention of Chemical Corporation of Colorado, and *on and about March 21, 1951 it agreed with these defendants to accept a return of*

all such defective, improperly packaged, and unsuitable merchandise *and to give credit to these defendants for the same at the price at which it had originally been shipped and billed out to these defendants.* No credit has been given to either or both of defendants for the goods, wares and merchandise so returned, which merchandise so returned was the defective, improperly packaged merchandise unsuitable for resale in the trade for which they were intended, for which plaintiffs now seek to recover." (R. 28.)

In the absence of fraud, an agreement to rescind, or total worthlessness, the remedy for breach of an implied warranty is a suit for damages, an action at law. No fraud was pleaded or proved, and the District Judge by his findings and judgment declared against the right of rescission. *He could not have found favorably to the respondents' claim of an agreement by Chemical Corporation of Colorado to accept return of the 1-2 Mix and awarded petitioners a judgment in any amount.* If the District Judge's findings are entitled to respect—and the Court of Appeals says all pertinent issues were issues of fact—the error in the judgment is manifest. A rescission is decreed at the same time the right to it is denied. To petitioners' counsel it seems the Court of Appeals compounded the error by saying that the trial court wrongly decided the facts and should not have given the petitioners a recovery for any part of the account sued on. Perhaps this is the only way out of the dilemma which results from a failure to enforce the distinction between legal and equitable remedies, and to impose the traditional conditions upon the right to rescind. Much more is involved than an exercise in Aristotelian logic.

In conclusion and by way of recapitulation: The respondents asserted a counterclaim and in so doing, the right *to rescind a fully executed contract of sale.* They could have held entitled or not entitled to rescind upon the evidence. The trier of facts held against the right to rescind. A judgment was accordingly rendered in the seller's favor, which was materially reduced by a counterclaim *perforce a holding which cannot be approved without sustaining the plea of rescission.* But had there been a right to rescind there could have been no recovery at all awarded the petitioners. This Court cannot extricate the courts below from their false position—without doing violence to the law as a system—by saying that the District Court meant to do something other than what it did do.

Barron & Holtzoff, in their *Federal Practice & Procedure, Secs. 1121 and 1123,* say:

> "The purpose of Rule 52(a) is to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court. Another purpose of requiring findings of fact and conclusions of law is to make definite just what is decided by the case in order to apply the doctrines of estoppel and res judicata to future cases."
>
> "Rule 52(a) requiring the trial court to find the facts specially and state separately its conclusions of law is mandatory and must be fairly observed."

The Court has recently declared that a question of practice is reviewable by writ of certiorari. *Cold Metal Process Company, et al. v. United Engineering & Foundry Company,* ..... *U. S.* ....., *100 L. Ed. 798.*

More or less as a footnote the Court is asked to consider the following in connection with the Court of Appeals' comment on the testimony of the respondent Phillip C. Mozer (Appendix v): An isolated, obviously inadvertent statement, probably induced by inattention, is taken by the court as a deliberate assertion and judicial admission, although poised against the entire weight of the petitioners' testimony by which they sought in page after page of testimony by the same witness, as well as numerous supporting witnesses, to establish that at the time in question the sale of industrial poisons in open-end drums was customary. This testimony was fortified by the testimony of disinterested witnesses to the effect that they had handled similarly packaged 1-2 Mix during the same period, and had sold it without any objection on account of the packaging, but did encounter difficulty because of an adverse market condition. No one other than respondents' president, H. Dean Smith, an interested witness, testified that the packaging of the 1-2 Mix in open-end drums affected its saleability. It is not conductive to a fair consideration of the case nor to a legally cohesive opinion, nor is it the law, for such an effect to be attached to Mozer's statement out of context.

CONCLUSION

Petitioners respectfully submit that a Writ of Certiorari should issue, considering the importance of the question and the extent of the departure by the courts below from the correct rule of practice involved, notwithstanding the case is otherwise not greatly important except to the parties.

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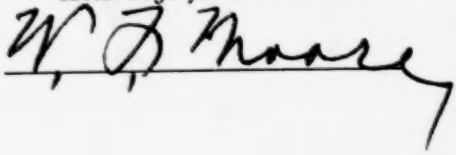

October, 1956

APPENDIX—OPINIONS OF THE COURTS BELOW

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS PARIS DIVISION

Civil Action No. 226

SAM C. MOZER, *et al.*, d/b/a MOZER BROS,
Plaintiffs,

v.

HI-YIELD CHEMICAL COMPANY, *et al.*,
Defendants.

JUDGMENT

Monday, February 21, 1955. This day this cause came on regularly for trial. The plaintiff, Philip C. Mozer, appeared in person and all plaintiffs appeared by and through their attorney of record. The defendants appeared by and through their president, H. Dean Smith, as well as by their attorney of record.

Said cause was tried before the court without the intervention of a jury, and the court proceeded to hear evidence until Friday, February 25, 1955, at which time the court continued said cause under advisement until April 8, 1955, at which date the court made and entered his findings of fact and conclusions of law and rendered his judgment in said cause allowing a recovery by plaintiffs against the defendants in the amount of $5,707.50, less a credit in favor of defendants in the sum of $1,244, or a net re-

covery of $4,463.50 in favor of the plaintiffs against the defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the court that the plaintiffs, Sam C. Mozer, Rose Mozer, Philip C. Mozer, and Lena Mozer, co-partners, doing business as Mozer Brothers, do have and recover of and from the defendants, Hi-Yield Chemical Company and Hi-Yield Fertilizer Company, the sum of $4,463.50, to bear interest at the rate of 6% per annum from April 8, 1955, until paid, together with the cost of this suit.

IT IS FURTHER ORDERED, as to all parties, that any and all other relief not herein specifically granted is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all cost is hereby taxed against the defendants herein.

IT IS FURTHER ORDERED that execution shall issue upon this judgment for collection of the principal recovery and the costs adjudged against defendants.

IT IS FURTHER ORDERED that all jurisdictional facts exist investing this court with jurisdiction of this suit, the parties, and this cause of action.

FILED AND ENTERED this 2nd day of June, 1955.

(Signed) LAMAR CECIL,
United States District Judge.

(R. 482-484.)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15876

SAM C. MOZER, *et al.*, d/b/a MOZER BROS,
Appellants,

v.

HI-YIELD CHEMICAL COMPANY, *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas.

(June 28, 1956.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge: This action was originally commenced by Chemical Corporation of Colorado, to whose interests appellants succeeded as assignees in bankruptcy. It sought to recover $35,913.50, the agreed purchase price of 7610 gallons of cotton insecticide, sold on open account, and an additional sum of $1113.06 for freight and demurrage charges, less a credit of $13,561.50 realized from the sale of the insecticide after it had been returned to Chemical Corporation of Colorado. The district court found the

facts and stated its conclusion as set forth in the margin,[1] and entered judgment for the plaintiffs for $4,463.50, plus 6% interest from April 8, 1955.

The appellants insist that said judgment was inadequate. The appellees do not cross appeal, but do insist, inter alia, that the appellants were entitled to no recovery and, hence, cannot complain. This disposition of this appeal turns, we

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[1] "*FINDING OF FACT*

"1.

"I find that on or about August 28, 1951, the defendants returned by rail to the plaintiffs' assignor two cars of cotton insecticide containing 7,610 gallons of such insecticide, such insecticide being shipped from Bonham, Texas, to Denver, Colorado.

"2.

"I find that when shipped to defendants such insecticide was improperly packaged and was sent to defendants in containers insufficient for use for the purposes for which insecticide was intended.

"3.

"I find that such insecticide was sold to the defendants at an agreed price of $4.50 per gallon, and that after return of such insecticide the plaintiffs' assignor took no steps to dispose of same for a period of approximately two years, and at the end of such period sold such insecticide for $1.75 per gallon.

"4.

"I find that the plaintiffs' assignor was negligent in holding such cotton insecticide for a period of approximately two years and did not act with due diligence in an effort to minimize its damages and that it should have, upon receipt of such cotton insecticide, sold the same immediately.

"5.

"I find that had plaintiffs' assignor sold such insecticide in Denver, Colorado, with promptness and with diligence it could have sold the same at a market price of $3.75 per gallon.

"6.

"I find that there was no express agreement upon the part of plaintiffs' assignor to receive and take back such cotton insecticide at the agreed purchase price of $4.50 per gallon.

"*CONCLUSIONS OF LAW*

"1.

"I find that plaintiffs are entitled to recover of and from the defendants the difference between the purchase price of the cotton insecticide, to-wit, $4.50 per gallon, and the existing market price of such cotton insecticide immediately after it was received in Denver, Colorado, by the plaintiffs' assignor, to-wit, $3.75 per gallon, or a judgment for a total sum of $5,707.50, less a credit to said defendants of $1,244.00, the amount of the deposits which defendants had made upon the insufficient and defective drums, in which the cotton insecticide was shipped to the defendants and sent back to the plaintiffs' assignor."

think, on whether there was any right to return the goods for breach of an implied warranty.

Philip C. Mozer, one of the appellants, was sales manager and vice-president of Chemical Corporation of Colorado, and as such conducted nearly all of its business dealings with the appellees. He admitted that he had understood that appellees were buying the products for resale to farmers in the packages in which purchased, and that he also knew that the insecticide could not be sold to farmers in the open head drums in which it was shipped. We think that there was a clear breach of the implied warranty that the insecticide as packaged was suited for resale in the trade for which it was intended.[2]

The testimony was in sharp conflict as to whether the appellees waived this breach of implied warranty, but there was ample evidence to sustain the implicit finding of the district court that the appellees had the right to return the improperly packaged insecticide. That being true, and the appellants being entitled to no recovery, they cannot successfully complain of the amount of judgment awarded them.

The judgment is therefore

AFFIRMED.

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[2] 37 Tex. Jur. 290, §§126, 326, 405, 555, 575-76.

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Petitioners,

v.

HI-YIELD CHEMICAL COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
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HI-YIELD CHEMICAL COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

To the Honorable Supreme Court of the United States:

OPINION BELOW

The Court of Appeals' opinion is reported in *234 F. 2d 906*. The trial court's findings of fact and conclusions of law are a part thereof. The trial court filed no opinion. Its judgment and the Court of Appeals' opinion, both brief, are shown in the Appendix.

JURISDICTION QUESTIONED

Petitioners perforce of *28 U.S.C., Section 1254*, and *Rule 19(b)* of this Court asks that jurisdiction be extended to this case.

The petition should be denied. No conflict of opinions is claimed. No conflict with applicable State law is asserted. This is a private suit and no important question of Federal law is in question. No Federal question has been decided conflicting with the Supreme Court's decisions, nor is this Court asked to use its power of supervision because of a radical departure from usual judicial procedure.

Petitioners recovered a money judgment in the District Court. They unsuccessfully appealed, hoping to increase the judgment. Petitioners prevailed in both Courts below in so far as a recovery is concerned.

Respondents are aware of no case in the nature of a private suit where this Court granted Certiorari to the prevailing party, but on the other hand it appears never to have been done. *Public Service Commission of Missouri, et al. v. Brashear Freight Lines, Inc., et al., 306 U. S. 204. Magnum Import Company v. Francois Joseph De Spaturno Coty, 262 U. S. 159, 163.*

The trial court's findings of fact were concurred in by the Court of Appeals. The evidence fully sustained such findings, as is hereafter in this opposition Brief pointed out, and no substantial right of Petitioners can be involved; hence, the Writ should be denied. *Graver Tank & Manufac-*

turing Co., Inc., et al. v. Linde Air Products Co., 336 U. S. 271, 275, and cited cases.

(Court of Appeals' opinion dated June 28, 1956—rehearing denied July 31, 1956.)

QUESTION PRESENTED

Petitioners ask the Writ to review the Court of Appeals' opinion, because it was stated therein that there was an *implicit* finding on the part of the District Court that Respondents had the right to return the improperly packaged insecticide, even though the District Court found there was no *express* agreement to receive it back.

The Circuit Court's opinion was certainly correct, though the case does not turn upon this complained of statement. The disposition of the case in the District Court, with the Court of Appeals affirming, was amply sustained on adequate grounds, pleaded and proved, as will be hereafter fully shown, and the narrow academic issue now sought to be injected for hearing before this Court, however decided, could not change the decree.

ADDITIONAL STATEMENT OF THE CASE

In addition to the Statement of the case made by Petitioners, these matters of record need pointedly to be made. Respondents answered in the trial court as follows:

1. That the merchandise was defective and was returned under an *express* agreement to receive it back at the sale price as a credit. (R. 24.) (This issue of fact was found against Respondents.)

2. That the insecticide as received was "improperly packaged, and unsuitable for resale in the trade for which they were intended." (R. 27, 31.) (This issue of fact was found for Respondents. Findings of Fact, R. 471.)

3. That Petitioners, after receiving the merchandise as returned, acted negligently and failed to use ordinary care to minimize their damages. (R. 31, 32.) (This fact issue was determined by the trial court in the exercise of his judicial power, he finding negligence on the part of petitioners in not disposing of the merchandise at its value when received back, and in holding same for over two years and then disposing of same at a much lower value than when received. Findings of Fact, R. 471, 472.)

Petitioners in the trial court moved for additional and amended findings of fact and conclusions of law (R. 473), fully answered by Respondents (R. 474), and Petitioners also filed a lengthy motion for a new trial (R. 484) in which Petitioners sought to have the trial court adjust his findings of fact in line with their contentions here. This the trial court refused to do (R. 481).

The evidence to support the Findings is ample and full.

NO REASON EXISTS FOR CERTIORARI

There is no conflict or incompatability in the trial court's finding and the Court of Appeals' expression that there was an implied finding of the right to return the insecticide where the trial court found the packaging to be wholly unsuitable. Under Texas law the right to return exists in

such case and a finding of unsuitable packaging carries with it the implied finding of the right to return and also a breach of implied warranty.

"FITNESS OR SUITABILITY FOR BUYER'S PURPOSE.—One of the recognized exceptions for the doctrine of caveat emptor is the implied warranty by seller of the fitness or suitability of goods purchased for a known purpose. It is settled that where property is bought for a special use of which the seller has knowledge or notice at the time of the sale, and in reliance upon his judgment or skill, there *is an implied warranty* that it is reasonably adapted or suited to the purpose of the buyer, and free from latent and inherent defects that substantially impair its usefulness for such purpose. The rule applies, in the absence of any express representation or warranty, to a sale by a manufacturer, producer, grower, or dealer. And it extends especially to sales of machinery." *37 Tex. Jur. 290, Sec. 126.*

"Under the foregoing rules, one who contracts to furnish means to accomplish a known purpose impliedly warrants that the means furnished are reasonably adapted and suited to the accomplishment of the purpose. A manufacturer who makes and sells an article to be used for a specific purpose impliedly warrants that it is reasonably fit for the purpose, when used in the proper and prescribed manner or quantity, and under prescribed conditions. Similarly a dealer who sells an article which is bought for a particular purpose, warrants its suitability for such purpose. On the other hand, when a merchant buys goods for resale in a particular market, there is an implied warranty on the part of the seller that they are suited to the market." *37 Tex. Jur., p. 294.*

"One who sells goods with knowledge that they are being purchased for resale, or with notice that the buyer requires them to fill a contract or order, con-

tracts in contemplation of the buyer's purpose. In such circumstances the seller impliedly warrants the fitness or merchantability of the goods, and may be held liable for special damages in case of a breach of the contract or warranty." *37 Tex. Jur. 326.*

"CIRCUMSTANCES IN WHICH BUYER IS NOT BOUND.—In some situations an acceptance is not given the effect above stated. Thus where an opportunity for inspection has been denied, or an inspection prevented by fraud, or where the acceptance has been induced by a promise of future adjustment, or by an unfair test, * * * it is clear that the buyer is not bound by it; and in such a situation he can recover his damages as if the goods had been sold to him without any provision for inspection." *37 Tex. Jur, 405.*

"DELIVERY OF GOODS NOT CONFORMING TO CONTRACT.—We have already shown (#180) that a buyer is under no obligation to accept goods that do not correspond to the requirements of the contract. If he finds, upon an inspection, that the goods differ in any material respect from what he ordered, he may reject them and sue for any damages that he has suffered by reason of the seller's breach of contract. Thus if he has paid the purchase price, he can recover it, together with the value of any benefit that he has been deprived of by reason of the seller's failure to comply with his undertaking." *37 Tex. Jur. 555.*

"BUYER'S RIGHTS GENERALLY.—The mere fact that the law accords to the buyer the right to take affirmative action against a seller who has wronged him (#232, et seq.) does not mean that it is always necessary for him to initiate any proceeding. On the contrary, he may ordinarily withhold payment, allow the seller to file his suit and then assert the wrong by way of defense, or as the basis of a set-off, or he may bring cross-action for positive relief." *37 Tex. Jur. 575-76.*

Thus from the above, it can be seen that these Respondents clearly had the right to return the insecticide upon the breach of the implied warranty of suitability, and the trial court could have refused Petitioners any recovery, as was held by the Court of Appeals.

The trial court, however, disposed of the case on the proposition that Petitioners received the goods back into possession; held them for two years before disposing of them; that the act of so holding was negligence; and that the proper measure of damages recoverable was the sale price less the value when received back. Judgment was accordingly rendered for $4,463.50, plus interest.

> "When the seller elects to resell goods in his possession, he thereby makes himself the agent of the buyer, and it is incumbent upon him to protect the latter's interests by acting as would a man of ordinary prudence in like circumstances. This means that he must make the resale within a reasonable time, conduct it in an honest manner, obtain the very best price he can, and keep his expenses within a reasonable figure." *37 Tex. Jur. 622.*

It is apparent that the question presented to this Court for review is for no purpose.

It has been clearly demonstrated that there was a breach of implied warranty, so found as a fact by the trial court, and such finding carries with it the implicit finding of a right to return the unsuitable insecticide.

Above this, the trial court convicted Petitioners of negligence under adequate pleadings and proof, adjusted the rights between the parties and rendered a money judgment

in favor of Petitioners, albeit nothing was due them. For this, they seek further review in this Court. Respondents believe the question presented to this Court does not in fact exist—if it does, it neither controls nor could it affect the disposition of this case.

CONCLUSION

Respondents respectfully urge that the Petition for Writ of Certiorari be denied for the reasons stated.

Respectfully submitted,

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APPENDIX

OPINIONS OF THE COURT BELOW

In the

District Court of the United States

For the Eastern District of Texas, Paris Division

Civil Action No. 226

SAM C. MOZER, *et al.*, d/b/a MOZER BROS.,
Plaintiffs,

v.

HI-YIELD CHEMICAL COMPANY, *et al.*,
Defendants.

JUDGMENT

Monday, February 21, 1955. This day this cause came on regularly for trial. The plaintiff, Philip C. Mozer, appeared in person and all plaintiffs appeared by and through their attorney of record. The defendants appeared by and through their president, H. Dean Smith, as well as by their attorney of record.

Said cause was tried before the court without the intervention of a jury, and the Court proceeded to hear evidence until Friday, February 25, 1955, at which time the court continued said cause under advisement until April 8, 1955, at which date the court made and entered his findings of fact and conclusions of law and rendered his judgment in said cause allowing a recovery by plaintiffs against the defendants in the amount of $5,707.50, less a credit in favor of defendants in the sum of $1,244, or a net recovery of $4,463.50 in favor of plaintiffs against the defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the court that the plaintiffs, Sam C. Mozer, Rose Mozer, Philip C. Mozer, and Lena Mozer, co-partners, doing business as Mozer Brothers, do have and recover of and from the defendants, Hi-Yield Chemical Company and Hi-Yield Fertilizer Company, the sum of $4,463.50, to bear interest at the rate of 6% per annum from April 8, 1955, until paid, together with the cost of this suit.

IT IS FURTHER ORDERED, as to all parties, that any and all other relief not herein specifically granted is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all cost is hereby taxed against the defendants herein.

IT IS FURTHER ORDERED that execution shall issue upon this judgment for collection of the principal recovery and the costs adjudged against the deefndants.

IT IS FURTHER ORDERED that all jurisdictional facts exist investing this court with jurisdiction of this suit, the parties, and this cause of action.

FILED AND ENTERED this 2nd day of June, 1955.

(Signed) LAMAR CECIL
United States District Judge.

(R. 482-484.)

OPINION

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,876

SAM C. MOZER, *et al.*, d/b/a MOZER BROS.,
Appellants,

v.

HI-YIELD CHEMICAL COMPANY, *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of Texas

(June 28, 1956)

Before RIVES, TUTTLE and JONES, Circuit Judges.

RIVES, Circuit Judge: This action was originally commenced by Chemical Corporation of Colorado, to whose interests appellants succeeded as assignees in bankruptcy. It sought to recover $35,913.50, the agreed purchase price of 7610 gallons of cotton insecticide, sold on open account, and an additional sum of $1,113.06 for freight and de-

murrage charges, less a credit of $13,561.50 realized from the sale of the insecticide after it had been returned to Chemical Corporation of Colorado. The district court found the facts and stated its conclusions as set forth in the margin[1] and entered judgment for the plaintiffs for $4,463.50, plus 6% interest from April 8, 1955.

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[1]FINDING OF FACT.

"1.

"I find that on or about August 28, 1951, the defendants returned by rail to the plaintiffs' assignor two cars of cotton insecticide containing 7,610 gallons of such insecticide, such insecticide being shipped from Bonham, Texas, to Denver, Colorado.

"2.

"I find that when shipped to defendants such insecticide was improperly packaged and was sent to defendants in containers insufficient for use for the purposes for which insecticide was intended.

"3.

"I find that such insecticide was sold to the defendants at an agreed price of $4.50 per gallon, and that after return of such insecticide the plaintiffs' assignor took no steps to dispose of same for a period of approximately two years, and at the end of such period sold such insecticide for $1.75 per gallon.

"4.

"I find that the plaintiffs' assignor was negligent in holding such cotton insecticide for a period of approximately two years and did not act with due diligence in an effort to minimize its damages and that it should have, upon receipt of such cotton insecticide, sold the same immediately.

"5.

"I find that had plaintiffs' assignor sold such insecticide in Denver, Colorado, with promptness and with diligence it could have sold the same at a market price of $3.75 per gallon.

"6.

"I find that there was no express agreement upon the part of plaintiffs' assignor to receive and take back such cotton insecticide at the agreed purchase price of $4.50 per gallon.

CONCLUSIONS OF LAW

"1.

"I find that plaintiffs are entitled to recover of and from the defendants the difference between the purchase price of the cotton insecticide, to-wit: $4.50 per gallon, and the existing market price of such cotton insecticide immediately after it was received in Denver, Colorado, by the plaintiffs' assignor, to-wit: $3.75 per gallon, or a judgment for a total sum of $5,707.50, less a credit to said defendants of $1,244.00, the amount of the deposits which defendants had made upon the insufficient and defective drums, in which the cotton insecticide was shipped to the defendants and sent back to the plaintiffs' assignor."

The appellants insist that said judgment was inadequate. The appellees do not cross appeal, but do insist, inter alia, that the appellants were entitled to no recovery, and, hence, cannot complain. This disposition of this appeal turns, we think, on whether there was any right to return the goods for breach of an implied warranty.

Philip C. Mozer, one of the appellants, was sales manager and vice-president of Chemical Corporation of Colorado, and as such conducted nearly all of its business dealings with the appellees. He admitted that he had understood that appellees were buying the products for resale to farmers in the packages in which purchased, and that he also knew that the insecticide could not be sold to farmers in the open head drums in which it was shipped. We think that there was a clear breach of the implied warranty that the insecticide as packaged was suited for resale in the trade for which it was intended.[2]

The testimony was in sharp conflict as to whether the appellees waived this breach of implied warranty, but there was ample evidence to sustain the implicit finding of the district court that the appellees had the right to return the improperly packaged insecticide. That being true, and the appellants being entitled to no recovery, they cannot successfully complain of the amount of judgment awarded them.

The judgment is therefore

AFFIRMED.

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[2]37 Tex. Jur. 290, Nos. 126, 326, 405, 555, 575-76.